IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1024 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

V.K.UPADHYAY,ASST.COLLECTOR OF CUSTOMS

Versus

M/S SHAH NAVNITLAL PUNJALAL

Appearance:

1. Criminal Appeal No. 1024 of 1985

MR DN PATEL for the appellant

MR SAURABH G AMIN for Respondent No. 1

MR KG SHETH, APP for the State.

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision:01/11/2001

ORAL JUDGEMENT

Mr. V.K.Upadhyaya, who is Assistant Collector of

Central Excise and Customs, Baroda Collectorate, Baroda, has filed this appeal under section 378 of the Code of Criminal Procedure, 1973 against the judgment dated July 31, 1984 rendered by the learned Judicial Magistrate, First Class, Padra in Criminal Case No.1063/82 by which the respondent no.1 is acquitted of the offence punishable under section 85(1)(b) of the Gold (Control) Act, 1968 for committing breach of provisions of section 85(1)(iv) of the Gold (Control) Act, 1968 ("the Act" for short).

2. During the year 1978, The Reserve Bank of India had conducted auction sale of standard gold bars. The respondent no.1 i.e. M/s. Shah Navnitlal Punjalal is a proprietory firm carrying on business as a gold dealer of which the original accused no.2 i.e. Mr. Navnitlal Pujalal is the proprietor. The respondent no.1 had purchased standard gold bars from the Reserve Bank of India when the auction sale was conducted. The case of the appellant was that the original accused no.2 had carried the entire quantity purchased in the name of the respondent no.1 to Padra and made necessary entries in statutory register G.S.11. According to the appellant, the respondent no.1 had delivered (i) 204.050 grammes of standard gold bars to one Hasmukhbhai Fulabhai Panchal of Padra by preparing voucher no.74 on October 8, 1978, and (ii) 129.850 grammes of standard gold bars to one Punambhai Fulabhai Panchal of Padra by preparing another voucher no.77 on October 9, 1978. Section 9 of the Act places restrictions on the disposal of gold acquired under any authorisation made by the Administrator and inter-alia, provides that every person who acquires gold under any authorisation made by the Administrator shall observe such conditions and be subject to such restrictions as may be specified therein and shall furnish to the Administrator an account of such gold, if so required by the Administrator. Further sub-section(2) of section 9 of the Act stipulates that no person receiving, accepting, buying or otherwise acquiring gold in accordance with any authorisation made by the Administrator, shall sell, deliver, transfer or otherwise dispose of, or agree to sell, deliver, transfer or otherwise dispose of, or expose or offer for sale, delivery, transfer or disposal of, such gold, except in accordance with such authorisation. Section 34 of the Act deals with sale or delivery of gold by a licensed dealer or a certified goldsmith and amongst other things provides that no licensed dealer shall sell, deliver, transfer or otherwise dispose of or agree to sell, deliver, transfer or otherwise dispose of or expose or offer for sale, delivery, transfer or disposal primary

gold to any person other than a licensed dealer or refiner or certified goldsmith. Section 42 places limits on primary gold which a certified goldsmith may possess and provides that no certified goldsmith shall either own or have at any time in his possession, custody or control any quantity of standard gold bars in excess of one hundred grammes, or any quantity of primary gold (including standard gold bars) in excess of three hundred grammes. Thus, the provisions of the Act do not permit a certified goldsmith to receive more than one hundred grammes of gold in the form of standard gold bars at a time. It indirectly implies that a licensed gold dealer cannot effect delivery of standard gold bar in excess of the quantity stipulated in section 42 of the Act, but in order to remove any possible doubt, notification S.O.369(E), dated June 2, 1978 was issued by the Gold Control Administrator in exercise of powers conferred by sub-section(1) of section 115 read with clause (iii) of the Provisio to Section 31, sub-section (6) of section 8 and sub-section(2) of section 9 of the Gold Control Act, 1968 making it obligatory on the licensed gold dealers not to sell, deliver or transfer the gold sold by the Reserve Bank of India to a certified goldsmith in excess of quantity mentioned in section 42 of the Act. The case pleaded by the appellant was that the respondent no.1 had contravened the provisions of section 9 of the Act read with notification no. S.O.369(E) dated June 2, 1978 by transferring and/or delivering standard gold bars acquired from the Reserve Bank of India in excess of one hundred grammes at a time to Hasmukhbhai Panchal and Punambhai Panchal, who were certified goldsmiths. Accordingly, the appellant had instituted Criminal Case No. 1063/82 in the Court of learned J.M.F.C., Padra and requested the Court to convict the accused of the offence punishable under section 85(1)(b) of the Act.

3. The complaint filed by the appellant was ordered to be registered in the register of criminal cases for the offence punishable under the provisions of the Act and summons were ordered to be issued to the accused. The complainant had examined himself as PW.1 at Exh.5; whereas Mr. Narendra Dayashanker Joshi, who was then Superintendent of Central Excise, Gold Cell, Vadodara was examined as PW.2 at Exg.17. The complainant had also produced registers maintained by the respondent no.1 as well as vouchers which were prepared by the respondent no.1 while effecting delivery of gold to Hasmukhbhai Panchal and Punambhai Panchal. The defence of the respondents was that they had delivered 'dhalki' (i.e. gold mixed with copper) which is primary gold and not standard gold bars as alleged by the appellant and as it

was not proved that quantity of primary gold delivered to Hasmukhbhai Panchal and Punambhai Panchal had exceeded 300 grammes as stipulated in section 42 of the Act read with notification S.O. no. 369(E), dated June 2, 1978, they had not committed any offence punishable under the Act and were entitled to be acquitted.

4. On appreciation of evidence adduced by the prosecution, the learned Magistrate held that the respondent no.1 had not sold standard gold bars purchased from the Reserve Bank of India either to Hasmukhbhai Panchal or Punambhai Panchal and what was done by the respondent no.1 was to deliver standard gold bars to the certified goldsmiths for the purpose of making ornaments. The learned Magistrate after referring to the dictionary meaning of word "delivery" as given in Chambers 28th Centuary Dictionary as well as definition of word "transfer" as given in section 5 of the Transfer of Property Act, held that what was prohibited by notification S.O. 369(E), dated June 2, 1978 was sale of the standard gold bars to the certified goldsmiths and not handing over of standard gold bars for the purpose of making and/or manufacturing ornaments etc. The learned Magistrate referred to the provisions of Section 9 of the Act and concluded that the phrase "sell, deliver, transfer or otherwise dispose of or agree to sell, deliver, transfer or otherwise dispose of" means selling, delivering, transferring or otherwise disposing of the standard gold bars as an owner thereof and not otherwise and, therefore, the accused had not committed breach of section 9 of the Act. The learned Magistrate noticed that the so-called breach of provisions of the Act had taken place in March, 1979, whereas the appellant had instituted complaint in the Court of learned J.M.F.C., Padra on September 13, 1982 which was clearly time barred in view of the provisions of section 468(2) of the Code of Criminal Procedure,1973 and, therefore, the complaint was liable to be dismissed. In view of the above-referred to conclusions, the learned Magistrate has acquitted the respondent no.1 by judgment dated July 31, 1984, giving rise to the present appeal.

5. I have heard Mr. D.N.Patel, learned Senior Standing Counsel for the Central Government, who appears on behalf of the appellant as well as Mr. Saurabh G.Amin learned counsel for the respondents and Mr. K.G.Sheth, learned A.P.P. for the State Government. I may observe that the institution of appeal is defective, inasmuch as no appeal is filed against the original accused no.2,who is the proprietor of the respondent no.1 and who is acquitted by the learned Magistrate and this defect is

not sought to be cured.

6. The view taken by the learned Magistrate that the complaint filed by the appellant on September 13, 1982 was time barred and, therefore, the original accused are entitled to acquittal, is totally erroneous in law. It is true that section 468 of the Code of Criminal Procedure prescribes period of limitation and states, inter-alia,that no Court shall take cognizance of an offence of the category specified in sub-section (2) after expiry of period of limitation, but the learned Magistrate has totally ignored the provisions of the Economic Offences (Inapplicability of Limitation) Act, 1974 enacted by the Parliament. The Parliament has enacted the Economic Offences (Inapplicability of Limitation) Act, 1974 to provide for the inapplicability of the provisions of Chapter-XXXVI of the Code of Criminal Procedure, 1973 to certain economic offences. Section 2 of the said Act provides that nothing in Chapter-XXXVI of the Code of Criminal Procedure, 1973 shall apply to any offence punishable under any of the enactments or provisions, if any, thereof specified in the Schedule. In the Schedule appended to the said Act, there is reference to the Gold (Control) Act, 1968 (No.45 of 1968) at serial no.10. Thus, it becomes evident atonce that no period of limitation is prescribed for taking cognizance of an offence punishable under the provisions of the Gold Control Act, 1968 and, therefore, the respondent no.1 could not have been acquitted on the ground that the complaint filed by appellant was time barred under section 468 of the Code of Criminal Procedure, 1973. The said finding being erroneous in law, is hereby set aside.

7. The view taken by the learned Magistrate that the respondent no.1 had not delivered, transferred or otherwise disposed of, or agreed to deliver, transfer or otherwise dispose of standard gold bars by way of sale to the certified goldsmiths and, therefore, they have not committed breach of provisions of section 9 of the Act, is based on total erroneous construction of the said provision. Section 9 of the Act stipulates that no person receiving, accepting, buying or otherwise acquiring gold in accordance with any authorisation made by the Administrator, shall (i) sell, deliver, transfer or otherwise dispose of, or agree to sell, deliver, transfer or otherwise dispose of, or (ii) expose or offer for sale, delivery, transfer,or disposal of, such gold, except in accordance with such authorisation. By interpreting that the delivery, transfer or disposal by the person receiving, accepting, buying or otherwise

acquiring gold in accordance with any authorisation made by the Administrator must be by way of sale, the learned Magistrate has applied rule of ejusdem generis. The ejusdem generis rule applies when (i) the statute contains an enumeration of specific words, (ii) the subject of enumeration constitutes a class or category, (iii) that class or category is not exhausted by the enumerations, (iv) the general term follows the enumeration,and (v) there is no indication of a different legislative intent. Before the ejusdem generis rule of construction can be accepted, apart from the fact that the rule must be confined within narrow limits, and general or comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment,it is requisite that there must be a distinct genus, which must comprise more than one species. Reading section 9 of the Act, it becomes manifest that it does contain an enumeration of specific word 'sell', which constitutes a class or category, but that class or category is exhaustive and is not followed by general terms, but by specific terms such as delivery, transfer or disposal or otherwise. The rule of ejusdem generis must be confined to within narrow limits and specific words following the word 'sell' must receive their full and natural meaning because those words are not restrictive in their intendment. The term 'transfer' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'delivery' uniformly applicable to all situations in the contexts of all statutes. Similarly, the terms 'transfer' and 'disposal otherwise' are of wide connotation and amplitude and include a large variety of powers which are incidental or consequential to achieve a particular objective. In the context of the provisions of the Gold (Control) Act, delivery, transfer or disposal of gold by a licensed dealer to a certified goldsmith can be in the capacity of bailor, mortgager, pledger etc. and it is not advisable to construe the phrase 'delivery, transfer or disposal of gold or otherwise' to mean that delivery, transfer or disposal must be by way of sale and not otherwise. The words 'delivery, transfer or disposal of gold otherwise' do not get colour from the preceding word "sale" and, therefore, it is wrong to interpret the provisions to mean that the delivery, transfer or disposal of gold must be by way of sale and not otherwise. The interpretation which is put by the learned Magistrate on section 9 of the Act has the tendency to render nugatory the object for which section 9 was enacted. If the intention of the Legislature had been that the delivery, transfer or disposal of the gold

otherwise must be by way of sale, then a simple provision could have been made by the Legislature and it was not necessary for the Legislature to use different phrases which are exhaustive in nature. Having regard to the facts of the case, I am of the opinion that by reading section 9 to mean that delivery, transfer or disposal of gold otherwise must be by way of sale, the learned Magistrate has re-written section 9, which is not permissible to a court of law. The said finding being erroneous in law and contrary to well recognised principles of interpretation of statutes, is also hereby set aside and the respondent no.1 would not be entitled to acquittal on the ground that delivery, transfer or disposal of the standard gold bars by it in favour of certified goldsmiths was not by way of sale thereof.

8. However, there is some force in the contention that the complainant has not proved satisfactorily that what was delivered by the respondent no.1 was standard gold bar within the meaning of section 2(u) of the Gold (Control) Act, 1968. Mr. Narendra Dayashanker Joshi , PW.2 Exh.17 in para-7 of his deposition has clearly admitted before the Court that in vounchers no.74 & 77 it was mentioned that what was given by the respondent no.1 to Hasmukhbhai panchal and Punambhai Panchal was 'dhalki (i.e. gold mixed with copper). The witness has specifically admitted that 'dhalki' can never be regarded as standard gold. What is admitted by Mr. Joshi in his deposition is that if delivery of dhalki is effected and the quantity is less than 300 grammes, then there would not be breach of either the provisions of notification S.O.No.369(E) dated June 2,1978 or any of the provisions of the Gold (Control) Act, 1968. In view of the clear admission made by the witness for the complainant, I am of the opinion that the complainant has not satisfactorily proved that what was delivered by the respondent no.1 to Hasmukhbhai Panchal and Punambhai Panchal was standard gold bar. The learned counsel for the respondent no.1 has produced a copy of order in original bearing No.5/ADJ/Gold/1988, dated June 2, 1988 passed by the Assistant Collector of Central Excise and Customs, DN.II, Vadodara. It is evident that the said order was passed after the judgment which is impugned in the appeal was delivered by the learned Magistrate. With the consent of the learned advocates for the parties, it is ordered to be taken on record of the case as an additional evidene under section 391 of the Code of Criminal Procedure, 1973 and is marked as Exh.28/A. It indicates taht in regard to delivery of so-called standard gold bars to Hasmukhbhai Panchal and Punambhai Panchal in excess of 100 grammes, proceedings were

initiated for imposition of penalty against the respondents. The Assistant Collector of Central Excise and Customs, DN.II, Vadodara, who adjudicated the notice, has held that the delivery of gold had taken place in the form of dhalki and that standard gold bars were not delivered. In view of the said finding, the proceedings initiated were ordered to be dropped by order dated June 2, 1988. Thus, even in departmental proceedings, it could not be proved that what was delivered by the respondent no.1 to the certified goldsmiths was standard gold bars and the proceedings for imposition of penalty had to be dropped. It is not the case of the complainant that quantity of dhalki which is primary gold delivered to Hasmukhbhai Panchal and Punambhai panchal had exceeded 300 grammes as stipulated in the notification read with section 42 of the Act. Thus, though the reasons given by the learned Magistrate for acquitting the respondent no.1 cannot be upheld and are set aside, the acquittal will have to be confirmed on altogether a different ground, namely, that it is not established by the complainant that the respondent no.1 had delivered to Husmukhbhai Panchal and Punambhai Panchal quantity of standard gold bar in excess of 100 grammes as claimed by the appellant.

For the foregoing reasons, the appeal fails and is dismissed.

(J.M.Panchal,J.)

(patel)